

Standard Operating Procedures (SOP) for Implementing Executive Order (EO) 13836, EO 13837, EO 13839, and Secretary's Memorandum (SM) 1076-1021, *OneUSDA – Foundational Responsibilities for Labor Relations*, dated June 21, 2018

SCOPE:

In order for the USDA to be the most efficient and effective Department in the Federal government, it is imperative that all USDA Mission Areas, agencies, and staff offices execute the Secretary's directive to be accountable for faithfully carrying out the work of the American people with integrity, consistency, dedication, fairness, mutual respect, and professional excellence each and every day.

To that end, the Secretary has revised SM 1076-1021, *One USDA – Foundational Responsibilities for Labor Relations* to reflect the principles and legal mandates enumerated in EO 13836, EO 13837, and EO 13839. Please note that SM 1076-1021 is applicable to all USDA labor relations programs and the responsibilities enumerated therein must be reflected in the negotiation and administration of collective bargaining agreements.

This SOP summarizes the steps Labor Relations Officers (LRO) are expected to follow to ensure the procedures and policies contained within the above-referenced documents are implemented successfully across the USDA.

APPLICABILITY AND LIMITATIONS:

This SOP applies to all LROs and their staff. Each Mission Area, agency, and staff office is charged with reviewing and understanding the principles, procedures, and time-lines set forth in this document; and must adhere to the procedures and policies outlined herein.

PROCEDURES:

If the agency anticipates negotiating a new term agreement, the LRO's notice to OHRM must include a description of all subjects or provisions that may be contrary to applicable Departmental directives, of policy concern, or which may lead to impasse; and, must include a complete copy of the existing CBA.

1. When negotiating a CBA, the LRO must ensure that all proposals and provisions comply with applicable law, and negotiations must be guided and informed by applicable Departmental Regulations, this Memorandum, and any other guidance provided by USDA leadership.
2. LROs may not engage in permissive bargaining. See EO 13836, Sec. 6.

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3. The LROs shall keep the affected Under or Assistant Secretary or staff office head reasonably informed regarding the progress of CBA negotiations.
4. The LRO shall collaborate fully with the Department by seeking, on an as needed basis, labor relations subject matter expertise, technical guidance, assistance, and training from the Office of Human Resources Management (OHRM), and legal advice and support from the Office of the General Counsel (OGC).
5. The LRO, as needed, shall consult with OHRM and OGC to ensure proper application of labor-relations doctrine concerning whether a change or proposal concerns a "condition of employment" requiring negotiations, or the negotiability of a proposal, including the application of the "covered by" and "compelling need" principles.
6. If the agency decides to allow a contract to rollover, the LRO must explain the agency's reasoning for doing so, and verify that the agreement conforms in all material respects to current law, government wide rule/regulation, and Departmental policies.
7. The LRO must ensure that all executed and rollover agreements are sent to the Departmental LR Office for Agency Head Review no later than three (3) work days from the execution date of the new agreement, or the date the window for reopening the contract has expired.
8. Prior to seeking LR assistance from OHRM and legal advice and support from OGC, the expectation is the LROs shall have undertaken comprehensive research efforts of their own, and attempted to resolve labor relations issues using their own independent judgment and knowledge.
9. The LROs must ensure a copy of all currently enacted CBAs are provided to the USDA LR Office for publication on the Departmental website.
10. To ensure integrity, consistency, and fairness, unless otherwise directed by the affected Under or Assistant Secretary or staff office head, existing CBAs generally should be renegotiated by each Mission Area, agency, and staff office at their earliest opportunity.
 - a. Any agency that is party to a collective bargaining agreement that has at least one provision inconsistent with EO 13839, (Removal Procedures) shall renegotiate, as applicable, any collective bargaining agreement provisions that are inconsistent with any part of this order or any final OPM regulations promulgated pursuant to this order.
 - b. Any agency that is party to a collective bargaining agreement that has at least one provision that is inconsistent with any part of EO 13837 (Taxpayer-funded Union Time) shall give any contractually required notice of its intent to alter the terms of such agreement and either reopen negotiations and negotiate to obtain provisions consistent with this order, or subsequently terminate such a provision and implement the requirements of this order, as applicable under law.

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11. When negotiating defined notice time periods for proposed organizational changes and other negotiable matters that are potentially appropriate for either substantive mid-term or impact and implementation USDA agencies should strive to bargain contractually-required timeframes that do not exceed 15 calendar days, or one work day for notice of meetings that may constitute "formal meetings."
12. To ensure fairness and consistency among USDA employees, and as faithful stewards of the taxpayers' dollars, USDA agencies must arrive at a negotiated solution that is consistent with EO 13837 (Taxpayer-funded Union Time)
13. When negotiating grievance procedures requiring formal written submissions, USDA agencies should strive to avoid unnecessary or duplicative steps or practices that might delay the fair resolution of the covered matters.
14. Whenever reasonable in view of the particular circumstances, agency heads shall endeavor to exclude from the application of any grievance procedures negotiated under section 7121 of title 5, United States Code, any dispute concerning decisions to remove any employee from Federal service for misconduct or unacceptable performance. See EO 13839, Sec. 3.
15. Flagrant misconduct or behavior that otherwise exceeds the bounds of protected activity is damaging to the good order and mission of USDA and will not be tolerated. Those engaging in such conduct may face potential discipline.

Consistent with EO **13836**, *Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining*, Mission Area, Agency, and Staff Office management officials must do more to apply the Statute in a manner consistent with effective and efficient Government. To fulfill this obligation, the LRO must:

1. At least one year prior to determining whether to open negotiations for a new or modified CBA or rollover of an existing CBA, the LRO must send a notice to the Departmental LR Office, the OGC, and to the relevant Under or Assistant Secretary or staff office head stating that contract negotiations are anticipated, or the agency is allowing the contract to rollover.
2. USDA must prepare and furnish the OPM Interagency Labor Relations Working Group a report on all operative term CBAs at least one year before their expiration or renewal date, recommending new or revised CBA language the agency could seek to include in a renegotiated agreement that would better support the objectives of Sec. 1. See EO 13836, Sec. 4(a).
3. Make every effort to secure a CBA that meets the EO's objectives. See EO 13836 Sec. 4 (b).
4. Consider the analysis and advice of the Labor Relations Group. See EO 13836 Sec. 4 (b).

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5. Ensure agency management and supervisors participate in the agency's negotiating team. See EO 13836, Sec. 4 (b).
6. Before beginning negotiations during a term CBA (I&I bargaining) over matters addressed in 5 USC 7106 (b)(2) and (3), agencies must evaluate whether the term CBA already covers these matters. If they are, the agency must not bargain over them. See EO 13836 Sec. 7(a).
7. Agencies that bargain over procedures pursuant to 5 USC 7106 (b)(2) must bargain over only those items that constitute procedures associated with the exercise of management rights, which do not include measures that excessively interfere with the exercise of these rights. See EO 13836 Sec. 7(b).
8. Agencies should, at the soonest opportunity, take steps to eliminate any bargaining approach other than the exchange of written proposals addressing specific issues. See EO 13836 Sec. 5(e).

Ground Rules

9. A negotiating period of six weeks or fewer to achieve ground rules, should ordinarily be considered reasonable and satisfy the "effective and efficient" goal of Sec. 1. See EO 13836 Sec. 5(a).
10. If the negotiations last longer than established by the ground rules, the agency must consider whether it should request assistance from the FMCS and FSIP. See EO 13836 Sec. 5(b).
11. In developing proposed ground rules, and during any negotiations, agency negotiators must request the exchange of written proposals. See EO 13836 Sec. 5(e).
12. Agencies must begin collective bargaining negotiations by making their best effort to negotiate ground rules that minimize delay, set reasonable time limits for good-faith negotiations, call for Federal Mediation and Conciliation Service mediation of disputed issues not resolved within those time limits, and promptly bring remaining unresolved issues to the Federal Service Impasses Panel for resolution. See EO 13836 Sec. 5(a).
13. Agencies must act to rescind requirements for any bargaining approach based on now-revoked executive orders, including Executive Order 12871 and Executive Order 13522. See EO 13836 Sec. 5(e).

Good Faith and Duration of Bargaining

14. Appropriate agency staff must notify the agency head once any negotiation reaches six months, and then monthly thereafter, with a status report. See EO 13836 Sec. 5(b).

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15. If the commencement or any other stage of bargaining is delayed or impeded because of a union's failure to negotiate in good faith, the agency must consider whether to file an unfair labor practice complaint after considering evidence of bad-faith negotiating, or propose a new contract, memorandum, or other change in agency policy and implement that proposal if the union does not offer counterproposals in a timely manner. See EO 13836 Sec. 5(c).
16. Agencies must continue to negotiate in good faith or request assistance from FMCS and FSIP while a ULP complaint is pending. See EO 13836 Sec. 5(d).

Miscellaneous Provisions

1. Agencies may not negotiate over the substance of the subjects set forth in 5 USC 7106 (b)(1), or engage in bargaining on any matter that management is not required to do so, e.g., proposals affecting the working conditions of managers or supervisors, etc. See EO 13836 Sec. 6.
2. Agencies that engage in any negotiation with a union must submit to OPM each term CBA currently in effect and its expiration date. See EO 13836 Sec. 8(a).
3. Agencies must also submit any new term CBA and its expiration date to OPM within 30 days of its effective date. See EO 13836 Sec. 8(a).
4. Agencies must submit new arbitral awards to OPM within 10 business days of receipt. See EO 13836 Sec. 8(a).

Consistent with EO **13837**, *Ensuring Transparency, Accountability and Efficiency in Taxpayer Funded Union Time Use*, Mission Area, Agency, and Staff Office management officials should ensure that taxpayer-funded union time is used efficiently and authorized in amounts that are reasonable, necessary, and in the public interest. To fulfill this obligation, the LRO must ensure that:

1. No agency shall agree to authorize official time unless it is reasonable, necessary, and in the public interest. See EO 13837 Sec. 3(a).
2. Agreements authorizing official time in an amount that would cause the union time rate to exceed one hour should ordinarily not be considered reasonable, necessary, and in the public interest, or to satisfy the "effective and efficient" requirement in Section 1 and the statute. Agencies **shall strive** for a negotiated union time rate of one hour or less. See EO 13837 Sec. 3(a).
3. The LRO must inform the agency head five (5) business days in advance of presenting/accepting a proposal that would result in a union time rate of greater than one hour for any bargaining unit. This reporting requirements **does not** apply to a union time

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rate established pursuant to an FSIP order or arbitrator's decision. See EO 13837 Sec. 3(b)(iii).

4. The statutory entitlements to official time for negotiating a CBA, attending impasse proceedings, or appearing at FLRA proceedings remain intact. See EO 13837 Sec. 3(c).
5. Employees may not engage in lobbying activities during paid time, except in their official capacities as an employee. See EO 13837 Sec. 4(a)(i).
6. Employees shall spend at least three-quarters of their paid time, each fiscal year, performing agency business or attending necessary training. See EO 13837 Sec. 4(a)(ii)(1).
7. Any time an employee's official time exceeds one-quarter of the employee's time in a fiscal year, the excess shall count toward subsequent fiscal years. See EO 13837 Sec. 4(a)(ii)(3).
8. No employee, when acting on behalf of a union, is permitted the free or discounted use of government property or agency resources if such free/discounted use is not generally available for non-agency business by employees when acting on behalf of non-federal organizations (including office or meeting space, reserved parking spaces, phones, computers, and computer systems). See EO 13837 Sec. 4(a)(iii).
9. Employees may not be reimbursed for expenses incurred performing non-agency business. See EO 13837 Sec. 4(a)(iv).
10. Employees may not use official time to prepare or pursue grievances (including arbitration of grievances) brought against an agency under the negotiated grievance procedure. However, this prohibition does not apply to: a) employees using official time to prepare for a grievance, to confer with a union regarding a grievance, or to present a grievance brought on the employee's own behalf; or b) employees using official time to challenge an adverse personnel action taken against them in retaliation for protected whistleblowing. See EO 13837 Sec. 4(a)(v)(1) and Sec. 4(a)(v)(2)(A) and (B).
11. Nothing in the order prohibits employees from taking unpaid leave to perform representational activities, including grievance processing. See EO 13837 Sec. 4(e).
12. Employees may not use official time without advance written authorization from their agency, except where obtaining prior approval is deemed impracticable under regulations/guidance. See EO 13837 Sec. 4(b).
13. Any employee who uses official time without advance written agency authorization, or for purposes not specifically authorized, shall be considered AWOL and subject to discipline. See EO 13837 Sec. 5(a).

14. Each agency must develop and implement a procedure governing the authorization of official time. Such procedure shall require a requesting employee to specify the number of hours to be used and the specific purposes for which the time will be used. See EO 13837 Sec. 5(b).
15. Each agency shall require separate advance authorization for any use of time in excess of previously authorized hours or for purposes for which time was not previously authorized. See EO 13837 Sec.5(b).
16. Each agency must develop and implement a system to monitor the use of official time to ensure that it is used only for authorized purposes. Agencies must ensure that official time is not used for internal union business or prohibited lobbying or political activities. See EO 13837 Sec. 5(c).
17. Each agency must implement the requirements of EO 13837 within 45 days, **except for** Section 4(b) (requiring advance written authorization for official time), which will be effective when the agency implements the authorizing procedure required by Section 5(b). See EO 13837 Sec. 8(a).
18. Each agency must consult with employee labor representatives about the order's implementation. Any agency with CBA provisions that are inconsistent with this order must give any contractually required notice of its intent to alter the CBA's terms, and either reopen negotiations and bargain to obtain provisions consistent with the order, or subsequently terminate such provisions and implement the order's requirements. See EO 13837 Sec. 8(b).
19. Nothing in the order will abrogate any collective bargaining agreement in effect on May 25, 2018. See EO 13837 Sec. 9(a).
20. Nothing in this order shall be construed to interfere with, restrain, or coerce any employee in the exercise by the employee of any statutory right, or encourage/discourage membership in any labor organization. See EO 13837 Sec. 9(b).

The provisions of EO **13839**, *Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles*, advance the ability of Mission Area, Agency, and Staff Office management officials to promote civil servant accountability consistent with merit system principles while simultaneously recognizing employees' procedural rights and protections. To fulfill this obligation, the LRO must ensure that:

1. Supervisors and deciding officials should not be required to use progressive discipline. See EO 13839 Sec. 2(b).

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2. Agencies should limit opportunity periods to an "amount of time that provides sufficient opportunity to demonstrate acceptable performance." See EO 13839 Sec. 2(a).
3. Agencies must endeavor to limit opportunity periods for demonstrating acceptable performance to no more than 30 days, except when management determines that a longer period is necessary to provide sufficient time to evaluate an employee's performance. See EO 13839, Sec. 4 (c).
4. Agencies shall endeavor to exclude removals for misconduct or unacceptable performance from negotiated grievance procedures. If an agreement cannot be reached, the agency shall request the assistance of the Federal Mediation and Conciliation Service and, as necessary, the Federal Service Impasses Panel. Within 30 days after the adoption of any collective bargaining agreement that fails to achieve this goal, the agency head shall provide an explanation to the President, through the Director of OPM. See EO 13839 Sec. 3.
5. Agencies shall not subject assignment of ratings of record or awards of incentive pay (including cash awards, quality step increases, and recruitment, retention, or relocation payments) to grievance procedures or binding arbitration. See EO 13839 Sec. 4(a).
6. Agencies shall not make any agreements that: 1) limit the agency's discretion to use Chapter 75 procedures to address unacceptable performance; 2) require use of Chapter 43 procedures before removing an employee for unacceptable performance; or 3) limit the agency's discretion to remove an employee without first engaging in progressive discipline. See EO 13839 Sec. 4(b).
7. Agencies shall renegotiate any CBA provisions that are inconsistent with the EO or any OPM regulations issued pursuant to the EO. See EO 13839 Sec. 7(b)(ii).

OPM AND/OR INTERAGENCY LABOR RELATIONS WORKING GROUP REPORTING REQUIREMENTS

1. USDA must prepare and furnish the OPM Interagency Labor Relations Working Group a report on all operative term CBAs at least one year before their expiration or renewal date, recommending new or revised CBA language the agency could seek to include in a renegotiated agreement that would better support the objectives of an efficient and effective Government. See EO 13836, Sec. 4(a).
2. If an agency agrees to authorize a union time rate greater than one hour, the agency head shall report this agreement/proposal to the president (through the Office of Personnel Management) explaining why such expenditures are reasonable/necessary/in the public interest. See EO 13837 Sec. 3(b)(i).

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3. That procedure shall also allow the authorizing official to assess whether it is reasonable and necessary to grant such amount of time to accomplish such tasks. See EO 13837 Sec. 5(b).
4. Each agency must submit an annual report to OPM on the following (OPM will issue a standardized reporting format for agency use. See EO 13837 Sec.7(a)):
 - a) The purposes for which the agency has authorized official time and the amounts used for each such purpose; EO 13837 Sec. 6(a)(i).
 - b) The job title and compensation of each employee who has used official time in the fiscal year, the total number of hours each employee spent on these activities, and the proportion of each employee's total paid hours that number represents; EO 13837 Sec. 6(a)(ii).
 - c) The total value of free or discounted use of government property allowed to labor organizations or individuals on official time; EO 13837 Sec. 6(a)(iii).
 - d) Any expenses the agency paid for activities conducted on official time; EO 13837 Sec. 6(a)(iv).
 - e) The amount of any reimbursement paid by labor organizations for the use of government property. EO 13837 Sec. 6(a)(v).
5. Agencies must notify the OPM Labor Relations Group (established under EO 13836) if a bargaining unit's union time rate exceeds one hour. See EO 13837 Sec. 6(b).
6. If an agency's aggregate union time rate has increased overall from the last fiscal year, the agency must explain this increase in the annual report. See EO 13837 Sec. 6(c).

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